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Termination of Agency by Death or Incapacity

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TERMINATION OF AGENCY BY DEATH OR INCAPACITY

The termination of an agency by the death or incapacity of the principal or agent raises some special problems in regard to the legal rights of persons who act after the death or incapacity, but before notice thereof. The practical problem is to determine which transactions should be sustained and which should be set aside; the technical issue is one of determining when the agency relationship terminates.

At common law an agency is instantly terminated by the death of the principal or agent;[1] notice of death is not required. An attempted exercise of agency authority by the former agent is not binding upon the heirs or representatives of the deceased principal,[2] nor can the personal representative of a deceased agent assume the authority and act in place of the deceased agent.[3] In certain other circumstances the common law required notice before the agency terminated. Such circumstances were termination by expiration of the agency term,[4] extinction of the subject matter of the agency,[5] renunciation by the agent,[6] and revocation by the principal.[7]

The civil law rule differed from the common law in that where either the agent or a third person performed some act in good faith and without notice of the death of the principal or agent the agency would not be deemed terminated simply by reason of the death.[8]

The Montana statute, like the civil law, requires notice before termination of the agency where either a principal or his agent dies or becomes incapacitated:[9]

> 2-304. **Termination of agency.** An agency is terminated, as to every person having notice thereof, by:
> 1. The expiration of its term;
> 2. The extinction of its subject;
> 3. The death of the agent;
> 4. His renunciation of the agency; or,
> 5. The incapacity of the agent to act as such.
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> 2-305. **Same—where coupled with an interest.** Unless the power of the agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:
> 1. Its revocation by the principal;
> 2. His death; or,
> 3. His incapacity to contract.

[1] Clayton v. Merett, 52 Miss. 353 (1876); 1 MECHEM, AGENCY §§ 652, 664, 671 (2d ed. 1914; STORY, AGENCY §§ 488-495 (2d ed. 1882); but not including those situations involving an "agency coupled with an interest" which are beyond the scope of this Note.
[2] 1 MECHEM, AGENCY § 652 (2d ed. 1914).
[3] *Id.* at § 671.
[4] Oakland Cotton Mfg. Co. v. Jennings, 46 Cal. 175 (1873).
[5] Isaacs v. Meline (Frank) Co., 2 Cal. App. 2d 341, 37 P.2d 1045 (1935).
[6] Thompson v. Machado, 78 Cal. App. 2d 870, 178 P.2d 838 (1947).
[7] Van Dusen v. Star Quartz Mining Co., 36 Cal. 571 (1869).
[8] Cassidy v. McKenzie, 4 W. & S. 282, 39 Am. Dec. 76 (Pa. 1837); Ish v. Crane, 8 Ohio St. Rep. 521 (1858), *reheard* 13 Ohio St. Rep. 574 (1862).
[9] REVISED CODES OF MONTANA, 1947.

In Montana and in other states which have adopted similar legislation the courts have created some confusion about the effect of this law by statements and implications that the statutes are simply declaratory of the common law and that death terminates the agency as a matter of law.

The Montana statutes, in common with the similar ones of California, North Dakota and South Dakota,[10] are derived from sections 1262 and 1263 of the proposed Civil Code of New York.[11] That code, commonly called the Field Code after one of its commissioners, was reported in 1865 to the New York legislature, but never adopted by that body. It was the avowed purpose of the commissioners in writing the Field Code "to cast aside known rules which are obsolete [and] to correct those which are burdensome, or unsuitable to present circumstances."[12] Furthermore the writers of that code enumerated in their report certain specific changes of common law rules which in their opinion should not be overlooked. Among those mentioned as changing the common law was section 1263, relating to termination of agency by death or incapacity of the principal only upon notice thereof.[13]

Although the sections state only when the agency will be terminated, there is a clear and necessary implication that the agency will continue with respect to persons who have no notice. In a comment to section 1263, referring to the "notice" clause, the Commissioners cite as authority for the notice requirement *Cassidy v. McKenzie*[14] and *Ish v. Crane*,[15] both of which ruled that where neither the agent nor the third person had notice of the principal's death the agency was not terminated as to them. The comment continues:

> It may be doubted whether this clause is at present law in this state . . . as it certainly is not in England . . . but, if not, it ought to be, in order to avoid the injustice of which Smout v. Ilbery[16] . . . furnishes a striking example. . . .
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> Insanity, not judicially declared, has been held to be no revocation . . . but this was on the ground that otherwise the authority would be thereby revoked *without* notice, an objection which this section obviates.

[10]CAL. CIV. CODE §§ 2355-2356; N.D. REV. CODE § 3-0111 (1943); S.D. CODE § 3.0109 (1939). In 1943, in view of the numerous powers of attorney given by members of the armed forces, the California legislature, in order to sustain such powers, eliminated the requirement of notice but at the same time provided that bona fide transactions entered into with the agent by a person acting without actual knowledge of the death of the principal was binding upon the latter's successors in interest. See Cal. Stats. 1943, ch. 413, § 1, at 1251. Also it is interesting to note that both North and South Dakota have revised and united connected subject matter under one statute.

[11]CODE COMMISSION REPORT TO THE MONTANA LEGISLATIVE ASSEMBLY, 4th SESS., *House Journal*, at 126 (1895).

[12]Introduction to the [Proposed] Civil Code of the State of New York *xvi* (1895).

[13]*Id.* at *xxxi*.

[14]4 W. & S. 282, 39 Am. Dec. 76 (Pa. 1837).

[15]8 Ohio St. Rep. 521 (1858), *reheard* 13 Ohio St. Rep. 574 (1862).

[16]In Smout v. Ilbery, 10 M. & W. 1, 152 Eng. Rep. 357 (Ex. 1842), a wife purchased provisions on her husband's credit during his absence and, as was later discovered, after his death. In an action to hold her personally liable for the goods it was held that she originally had full authority to contract the debt in her husband's name; that the person supplying her took equally with her the chance of the continued life of the husband; and that his death being an act of God, should work her no harm. She was hence acquitted of the debt. It was considered furthermore that the estate of the husband was not bound either.

Considering these comments to sections 1262 and 1263, together with the declaration in the introduction that the Commissioners' purpose was to change unsuitable rules, and with the specific reference to section 1263 as such a change, it is clear that a rule contrary to the common law was intended.

When in 1872 the California Civil Code adopted sections 1262 and 1263 of the Field Code, the above quoted comments were included as annotations.[17] Montana in turn adopted these sections from California as part of the Montana Civil Code of 1895.[18] As the statute stands, therefore, it appears that the intention of the legislature was to deviate from the common law and to provide that an agency is not terminated in any manner until notice is received of the facts which bring about termination.

Despite the clear establishment of the common law rule, there are a few cases which have adopted the civil law view even without the aid of statute. In *Ish v. Crane*[19] the Ohio court pointed out in 1858 that at common law the principal's revocation of his agent's authority is not binding until the principal notifies the agent. Why, the court asked, should there be a contrary rule where authority is terminated by operation of law upon the death of the principal?

The Missouri court ruled similarly in *Dick v. Page*[20] in 1852. The principal had authorized his agent to borrow money and to transfer the necessary security therefor. The principal died, but in ignorance of his death the agent borrowed money, transferred security in the form of assignment of promissory notes, and used the money in the principal's business. When the notes were paid to the assignee, suit was brought by the principal's executor to recover the sums so paid. The court held that the death of the principal did not terminate the agent's authority to borrow the money, and that "to hold that this transaction is void, would shock the sense of justice of every man, and we cannot be persuaded, that a principle which would produce such a result, should be applied to the facts which exist in this case."[21]

In the 1837 Pennsylvania case of *Cassidy v. McKenzie*[22] the principal authorized his agent to make certain payments to a third person, which the agent then did in ignorance of the principal's intervening death. The court argued that if a payment may be good today, or bad tomorrow, from the accidental circumstance of the death of the principal, which fact was not known and by no possibility could be known, it would be unjust to the agent and to the third person. In the civil law bona fide acts of the agent in ignorance of the death of the principal are held valid and binding upon the heirs of the latter. The court said the common law must comport with reason and held that the payment in ignorance of the principal's

[17] CAL. CIV. CODE §§ 2355-2356 (1872).
[18] MONT. CIV. CODE §§ 3150-3151, 1895). Though the comments to the Field and California Codes were not used, the annotation to the Montana Civil Code was clearly to the same effect, referring to the consideration of a similar Maryland statute in Clayton v. Merett, 52 Miss. 353 (1876).
[19] Ohio St. Rep. 521 (1858), *reheard* 13 Ohio St. Rep. 574 (1862).
[20] 17 Mo. 234 (1852).
[21] *Id.* at 237.
[22] 4 W. & S. 282, 39 Am. Dec. 76 (Pa. 1837).

death was good. Despite the appeal of such a rule, an 1860 California case[23] characterized it as standing alone among common law authorities and opposed by a formidable array of contrary authority. The California court expressed regret at the injustice of the common law rule, but felt that remedial measures were the province of the legislature.

In 1929 the Supreme Court of Oklahoma, without aid of a statute, adopted the civil law rule. In that case[24] the principal died six months before a promissory note payable to him was due. At maturity the debtor, without notice of the death, paid the note to an agent. The court held the payment good and binding upon the estate.

Though the aforementioned cases are much in the minority, they serve to indicate the dissatisfaction with the common law rule and hence to lend support to the belief that the drafters of the Field Code, and the legislatures adopting that language, intended to abrogate the common law in favor of the civil law rule requiring notice in all situations.

TERMINATION BY DEATH

No cases have been found in California, Montana, South Dakota or North Dakota in which the court has been called upon to apply the notice requirement of the statute. There are a number of cases, however, in which the courts by general language have left themselves open to misunderstanding. For example, in 1903 the North Dakota Supreme Court said, in dictum:[25]

> But assuming that the application was accepted by [the third party] prior to [the principal's] death, still we clearly are of the opinion that the power of attorney given to [the agent] did not survive the death of [the principal]. If [the third party] thereafter advanced the money, it did so at its peril. . . . [The power] was terminated by the death of [the principal].

In the context of the case the dictum may be true, but it seems susceptible to the interpretation that notice of the death is irrelevant.

In California a number of cases have said that the death of the principal terminates the agency *immediately* by operation of law. In one instance[26] the principal left for Alaska, leaving his farm in charge of an agent. The principal died at sea, but this was not known until a year later. The court stated, in what appears to be only dictum, that the agency ceased by operation of law at the death of the principal since a dead man cannot have an agent, in the ordinary meaning of that term. In other cases the principal has given what purports to be an irrevocable power of attorney to convey land and the agent undertakes to transfer the land after the principal's death.[27] The decision is likely to be that if the power of attorney is not coupled with an interest it is not irrevocable and that death revokes the agency by operation of law, making the subsequently executed deed void. These cases, however, concentrate upon the contention

[23]Travers v. Crane, 15 Cal. 12 (1860).
[24]Catlin v. Reed, 141 Okla. 14, 283 Pac. 549 (1929).
[25]Brown v. Skotland, 12 N.D. 445, 97 N.W. 543, 544 (1903).
[26]Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232 (1888).
[27]Frink v. Roe, 70 Cal. 296, 11 Pac. 820 (1886); Kunz v. Anglo & London Paris Nat. Bank, 214 Cal. 341, 5 P.2d 417 (1931).

that the power of attorney is irrevocable and the question of notice of the death is not in issue.

In 1891 the California court did mention the statutory requirement of notice, quoting the entire provision and then holding that at the principal's death the power of the agent to sell property ceased as to the third party, who had notice of the principal's death.[28] Since the same result would have followed from the common law rule, the decision is not particularly helpful, though it does refer to "notice."

In one Montana case[29] the court held that though the third party had no notice of the revocation of the agent's authority, since the former agent was in any event acting in excess of the powers which had once been delegated to her the act could not be binding upon the principal. In dictum, however, the court said of the sections of the statute governing termination of agency that they "are but declaratory of the common law rule." This appears to be true insofar as it relates to the requirement of notice before revocation of an agent's authority is effective, but insofar as it seems to include the termination of agency by death or incapacity it tends to be misleading.

Another Montana case[30] was one in which the court held that since there was no power coupled with an interest the death of the principal terminated the agency. Though the question of notice was not involved, the court added that the termination by death of the principal was "as to every person having notice thereof."

Two Montana cases deal with the powers of an attorney upon the death of his client. The court held in 1910 that the authority of an attorney ceased upon the death of his client so that the opposing party in a lawsuit could not be defaulted for failure to serve a reply upon him.[31] There was no one upon whom service could be made until a substitution in the suit of an administrator for the deceased client. There was no mention of any problem of notice. In 1915 the statute was amended to avoid this result.[32] It now provides that the death of a party to an action does not revoke the authority of his attorney of record, which continues until there is a change of record. This situation thus represents an exception to the general rule. Here even notice of the principal's death does not effect termination of the agent's authority.

TERMINATION BY INCAPACITY

In the four states adopting the Field Code provisions there are no decisions dealing directly with incapacity of an agent. However, in 1926 the California court said:[33]

> It is the statutory rule in this state that the power of an agent is terminated as to any person having notice thereof by the incapacity of the agent to contract. . . . It is also well recognized

[28]Krumdick v. White, 92 Cal. 143, 28 Pac. 219 (1891).
[29]Nord v. Boston and Montana Consolidated Copper and Silver Mining Co., 33 Mont. 464, 89 Pac. 647 (1906).
[30]Trenouth v. Mulroney, 124 Mont. 499, 508, 227 P.2d 590, 595 (1951).
[31]State v. District Court, 42 Mont. 496, 113 Pac. 472 (1910).
[32]Revised Codes of Montana, 1947, § 93-2101.
[33]Sullivan v. Dunne, 198 Cal. 183, 244 Pac. 343, 346 (1926).

> by the authorities that the law of principal and agent is generally applicable to the relation of attorney and client . . . and that the insanity or incapacity of the client will therefore operate as a termination of the authority of attorney. . . .

As to the incapacity of a principal, a South Dakota decision held an agency to be terminated when the principal lost capacity to contract, but the decision did not mention the requirement of notice.[84]

As in the case of death, the cases dealing with termination of agency by incapacity may deal with the existence of a power coupled with an interest and may rule that upon incompetency the agency is terminated by operation of law. Since notice may not be in issue, the statements must be taken subject to qualification.[85]

In 1912 the California court ruled that a power of attorney was terminated by the principal's insanity as between the principal and agent, and as to every other person having notice of the principal's disability.[86] The termination is, however, only a qualified one, since the court held that if upon recovery the principal ratifies or fails to repudiate the acts of his purported agent the powers previously granted will be considered merely suspended, and the acts of the agent will be deemed assented to by the principal. This is to be contrasted with the general rule that before a principal can ratify the acts of his agent the principal must, at the time the agent acted, have had capacity to perform the act for himself.

CONCLUSION

In the interpretation of statutes the legislative will is the all important factor. The courts should ascertain and declare the intention of the legislature and then carry out such intention.[87] It is submitted that the courts, while not rejecting the rule embodied in the Montana statute, have left the situation at least ambiguous by their repeated references to termination as a matter of law upon death or incapacity.

The common law position is supported by the technical argument that what a dead man cannot himself do he cannot do through another; the civil law rule is based upon considerations of justice to persons who have acted in good faith and perhaps to their detriment in ignorance of the principal's death or incapacity. It promotes swiftness and finality in commercial transactions. Practically requires that an agency, once constituted, should continue to be duly accredited until notice to the contrary is given. The legislature has approved this policy; it is for the courts to give it life.

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[84]Fischer v. Gorman, 65 N.D. 453, 274 N.W. 866 (1937).
[85]Capital Nat'l Bank v. Stoll, 220 Cal. 260, 30 P.2d 411 (1934).
[86]San Francisco Credit Clearing House v. MacDonald, 18 Cal. App. 212, 122 Pac. 964 (1912).
[87]*In re* Wilson's Estate, 102 Mont. 178, 56 P.2d 733 (1936); State *ex rel.* Carter v. Kall, 53 Mont. 162, 162 Pac. 385 (1917); State *ex rel.* Griffin v. Greene, 104 Mont. 400, 67 P.2d 995 (1937).